

David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADD RULE 57.1 AND)	
RULE 57.2, ARIZONA RULES OF)	Supreme Court No. R-08-_____
CIVIL PROCEDURE)	
_____)	

Pursuant to Arizona Supreme Court Rule 28, David K. Byers, Director, Administrative Office of the Courts, respectfully petitions this Court to adopt the attached proposed new Rules 57.1 and 57.2 of the Arizona Rules of Civil Procedure to govern actions filed pursuant to A.R.S. sections 12-771 and 12-772.

I. Background and Purpose of the Proposed New Rules. House Bill 2321 was passed in the Second Regular Session of the Forty-eighth Legislature (2008). The bill's effective date is January 1, 2009. The bill added Article 17 to Title 12, Chapter Six, specifically A.R.S. sections 12-771 and 12-772.

A.R.S. section 12-771 allows a person whose personal identifying information was used by another person in the commission of a criminal offense to

obtain a declaration of their own factual innocence for that offense. An action pursuant to A.R.S. section 12-771 may be brought by an individual person, or by the prosecuting agency on behalf of that person. The bill also added a section to Title 13, A.R.S. section 13-4440, which provides a victim of the criminal offense with certain rights in an action brought under A.R.S. section 12-771.

A.R.S. section 12-772 permits a person to seek relief if, as a result of that person's personal identifying information being taken, the person's name was improperly entered in a civil action or judgment. The statute refers to this situation as a "factual improper party status".

The relief provided under either section 12-771 or section 12-772 is rendered by the Superior Court.

II. Contents of the Proposed New Rules. The proposed new rules are sequenced after Rule 57, the general rule for declaratory relief. The proposed new rules provide a procedural mechanism for seeking a declaration of factual innocence or factual improper party status. The proposed rules include directions for filing and service of the petition; permit discovery upon stipulation or by court order; affirm the evidentiary standard of "clear and convincing"; and describe the process for obtaining an order.

III. Pre-petition Comments. Petitioner transmitted a draft of this petition and proposed rules electronically on October 15, 2008, to the following individuals

and entities: Committee on the Superior Court, Committee on Limited Jurisdiction Courts, Superior Court Administrators, Superior Court Clerks, Limited Jurisdiction Court Administrators Association, Arizona Prosecuting Attorneys' Advisory Council (Ed Cook), Maricopa County Attorney (through Phil MacDonnell), Arizona Public Defenders Association (Dana Hlavac and James Haas), the Arizona Attorneys for Criminal Justice (James Belanger), the Arizona Association of Chiefs of Police (John Thomas), and the State Bar of Arizona (Robert Van Wyck).

Informal comments received to date have inquired whether a filing fee will be required on a petition for a determination of factual innocence brought by a person, rather than by a prosecuting agency, under proposed Rule 57.1. Petitioner believes that a person other than a prosecuting agency will be required to pay a filing fee.

An informal comment from a clerk of the superior court specifically requested that a petition filed under either of the proposed rules include information concerning the location of the court in which any underlying action was filed. The rules were accordingly modified to require the party to include a statement in the petition of the specific court location and case number of any applicable underlying action or charge.

IV. Proposed Public Comment Period. Petitioner respectfully recommends a public comment period for the proposed rules ending May 20, 2009.

V. Effective Date of the Proposed New Rules. Petitioner requests expedited adoption of the proposed new rules under Rule 28(g) of the Rules of the Supreme Court. Because actions under HB 2321 can be filed after January 1, 2009, a procedural mechanism is required to be in place by that time, and the annual rule processing cycle would be inadequate. Petitioner respectfully requests that the proposed new rules be made effective on and after January 1, 2009.

RESPECTFULLY SUBMITTED this 3rd day of November, 2008.

By _____
David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

PROPOSED RULE 57.1, ARIZONA RULES OF CIVIL PROCEDURE

Rule 57.1. Declaration of Factual Innocence

- A. Scope of rule. This rule governs the determination of factual innocence of a person who claims pursuant to A.R.S. section 12-771 that their personal identifying information was taken, and as a result their name was used by another person who was arrested, cited, or charged with a criminal offense, or entered as of record in a judgment of guilt in a criminal case.
- B. Filing. A petition brought under this rule shall be filed in the Superior Court in the county in which the other person was arrested for, or cited or charged with, a criminal offense. The petition shall be assigned a civil case number. If applicable, the petition shall state the specific court location where the underlying charge was filed, or the judgment of guilt was entered, and the case number of that prior filing. The petition shall be captioned: In re: (name of petitioner).
- C. Service. The Petitioner shall serve the petition in the manner prescribed by A.R.S. section 12-771 and by these rules.
- D. Transmission of Records. If the petition is related to a charge filed in a justice of the peace court or a municipal court, the Clerk of the Superior Court shall request the justice of the peace or presiding officer of the municipal court to transmit a copy of the file to the Clerk's office.
- E. Discovery. Discovery may be conducted upon stipulation of the parties, or by order of the court.
- F. Evidence. The Petitioner must establish factual innocence by clear and convincing evidence.
- G. Hearing and Determination.

 - 1. The Court may hold a hearing to determine the Petitioner's factual innocence.
 - 2. If the Court holds a hearing, the victim of the offense identified in a judgment of guilt, or committed by the person arrested for, or cited or charged with, a criminal offense, has a right to be present and to be heard at the hearing.
 - 3. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.
- H. Order. On a finding of factual innocence related to an arrest, citation, or charge, the Court shall notify the following persons, if applicable: the Petitioner; the prosecuting agency

which filed the charge; the law enforcement agency which made the arrest or issued the citation; the defense attorney.

PROPOSED RULE 57.2, ARIZONA RULES OF CIVIL PROCEDURE

Rule 57.2. Declaration of Factual Improper Party Status

- A. Scope of rule. This rule governs petitions alleging factual improper party status pursuant to A.R.S. section 12-772, if as a result of a person's personal identifying information being taken, the person's name was entered as of record in a civil action or judgment.
- B. Filing. A petition brought under this rule shall be filed in the Superior Court for the county in which the Petitioner's name was entered as of record in a civil action or judgment because of alleged improper use of the Petitioner's personal identifying information. The petition shall be assigned a civil case number. The petition shall state the specific court location where the underlying action was filed, and the case number of the prior filing.
- C. Service. The Petitioner shall serve the petition in the manner prescribed by these rules on all parties in the civil action in which the Petitioner's identity was allegedly used.
- D. Transmission of Records. If the petition is related to a case filed in a justice of the peace court, the Clerk of the Superior Court shall request the justice of the peace to transmit a copy of the file to the Clerk's office.
- E. Discovery. Discovery proceedings may be conducted on a petition brought pursuant to this rule upon stipulation of the interested parties, or by order of the court.
- F. Evidence. The Petitioner must establish improper party status by clear and convincing evidence.
- G. Hearing.
 - 1. The Court may hold a hearing on the petition.
 - 2. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.
- H. Order. The Court shall provide notice of the Court's findings to the Petitioner and to all parties in the civil action in which the Petitioner's identity was allegedly used.